UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION
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MDL No. 2672 CRB (JSC)

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

This Order Relates To:
Dkt. No. 6423

BONDHOLDER ACTION
_____/

Plaintiff, a public pension fund, purchased Volkswagen bonds in 2014. In October 2015, one month after Volkswagen's diesel scandal became front-page news, Plaintiff sold those bonds for a loss. Plaintiff then filed a proposed class action against Volkswagen for violations of the federal securities laws. In that action, Plaintiff maintains that Volkswagen was required (but failed) to disclose in its 2014 bond offering memorandum that the company was using defeat devices in millions of diesel cars worldwide to cheat on emissions tests and was at risk of losing billions of dollars as a result. Without that information, Plaintiff asserts that the offering memorandum was misleading and led investors to purchase the company's bonds at artificially inflated prices.

Volkswagen has moved for summary judgment. The company argues that summary judgment is warranted because Plaintiff lacks the evidence needed to prove reliance, which is one of the elements of its claims. Specifically, Volkswagen urges that the evidence is insufficient to support that Plaintiff's investment manager, who bought the bonds on Plaintiff's behalf and had complete discretion to do so, read the offering memorandum before executing the trade. And without such proof, Volkswagen insists that Plaintiff cannot prove that its investment manager would have acted differently and foregone purchasing the bonds if additional disclosures had been

made in the offering memorandum.

Having reviewed the record and—once more—the relevant caselaw, the Court concludes that this case is best characterized as "primarily a nondisclosure case," as opposed to a "positive misrepresentation case." *Binder v. Gillespie*, 184 F.3d 1059, 1064 (9th Cir. 1999). As a result, Plaintiff is entitled to a presumption of reliance under *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153–54 (1972), and need not prove that it or its investment manager actually relied on the statements made in the bond offering memorandum. *See Binder*, 184 F.3d at 1063–64.

The case is best characterized as a nondisclosure case because, as the Court noted in *Bondholders I*, the "heart of the case" is an omission. *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig. (Bondholders I)*, No. MDL 2672 CRB (JSC), 2017 WL 3058563, at *14 (N.D. Cal. July 19, 2017). Volkswagen failed to disclose that, for years, it had been secretly installing defeat devices in its "clean diesel" line of cars to mask unlawfully high emissions, and that it was at risk of losing billions of dollars in fines and penalties if it was caught. Volkswagen's failure to disclose this information is ultimately what drives Plaintiff's claims.

To be sure, Plaintiff does also base its claims on certain affirmative statements in the bond offering memorandum. (*See* Dkt. No. 4956, SAC ¶ 227 (detailing disclosures about Volkswagen's focus on emission-reducing technologies and its need to comply with increasingly stringent emission laws).) As the Court noted in *Bondholders I*, though, "none of these statements were necessarily false," and the reason they are relevant is that they may have been rendered misleading by Volkswagen's failure to disclose its emissions fraud. *See* 2017 WL 3058563, at *6–7. Even these affirmative statements, in other words, are tethered to the omission that is at the heart of the case.

In reaching this holding, the Court backtracks from *Bondholders II*, where it relied on *Waggoner v. Barclays PLC*, 875 F.3d 79 (2d Cir. 2017), in reasoning that *Affiliated Ute*'s presumption of reliance did *not* apply. *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig. (Bondholders II)*, No. MDL 2672 CRB (JSC), 2018 WL 1142884, at *1–6 (N.D. Cal. Mar. 2, 2018). For the reasons brought to the Court's attention by Plaintiff and discussed in *Bondholders III*, the Court concludes that its interpretation of *Affiliated Ute* in

Bondholders II was inconsistent with *Binder*, 184 F.3d at 1063–64 and with *Blackie v. Barrack*, 524 F.2d 891, 905–06 (9th Cir. 1975). *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig. (Bondholders III)*, 328 F. Supp. 3d 963, 973–78 (N.D. Cal. 2018) (considering but not ruling on Plaintiff's request for reconsideration of *Bondholders II*). *Binder* and *Blackie* are binding on this Court; *Waggoner* is not. Under *Binder* and *Blackie*, the Court concludes that *Affiliated Ute*'s presumption of reliance applies.[1]

Having determined that a presumption of reliance applies, the Court turns to whether Volkswagen has sufficiently rebutted that presumption. To do so on summary judgment, Volkswagen must offer evidence that establishes "beyond controversy" that Plaintiff's investment manager "would not have attached significance to the omitted facts, and therefore would have acted as he did if he had known the truth." *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003); *Keirnan v. Homeland, Inc.*, 611 F.2d 785, 789 (9th Cir. 1980).

Pointing to the deposition of Plaintiff's investment manager, Volkswagen contends that the evidence in the record would not permit a jury to reasonably conclude that the investment manager read the bond offering memorandum before purchasing the bonds. Based on that interpretation of the record, Volkswagen insists that it has rebutted the presumption of reliance; for if Plaintiff's investment manager did not read the offering memorandum, then, the theory goes, Plaintiff cannot prove that its investment manager would have attached significance to the emissions fraud (and foregone the investment in Volkswagen bonds) if Volkswagen had disclosed the fraud in the offering memorandum.

In the run-of-the-mill omissions case, an investor's failure to read the relevant disclosure documents could indeed be fatal. Having not read those documents, any additional disclosures in them would have been unlikely to come to the investor's attention. As a result, it would be

[1] Volkswagen's contention that *Blackie* was only a fraud-on-the-market case is inaccurate. As the Ninth Circuit explained in a subsequent decision, *Blackie* "brought within the scope of *Affiliated Ute* a case in which it was alleged that certain material facts were omitted from [certain] reports," and the reports "contained representations rendered inaccurate by the omissions." *Little v. First Cal. Co.*, 532 F.2d 1302, 1304 (9th Cir. 1976). *Blackie*'s reasoning that reliance could also be proven on the facts of the case based on the fraud-on-the-market theory was only "an alternative rationale for its holding." *Id.* at 1304 n.3.

difficult for the investor to prove that he would have acted differently—and avoided the investment—if additional disclosures were made in those documents.

This is not a run-of-the-mill omissions case, however. The omitted facts detailed Volkswagen's large-scale and long-running defeat-device scheme. When that scheme was disclosed to the public, in September 2015, it was front-page news and prompted congressional hearings, video apologies by Volkswagen executives, and hundreds of lawsuits. The disclosure also prompted Plaintiff's investment manager to reevaluate Plaintiff's investment in Volkswagen bonds and to sell those bonds for a loss within a month's time. (*See* Dkt. No. 6580–1, Berg. Decl., Exs. 8–12.)

If Volkswagen had disclosed its defeat-device scheme in its 2014 bond offering memorandum, instead of waiting until September 2015, the same publicity, and the same response by Plaintiff's investment manager, would likely have followed. The scheme was so substantial and blatant that it is hard to fathom that its disclosure would have gone unnoticed by the investing public, and that Plaintiff's investment manager would not have been made aware of it.

Assuming, then, that Volkswagen's evidence demonstrates that Plaintiff's investment manager did not read the offering memorandum prior to purchasing the bonds, that evidence alone is insufficient to establish beyond controversy that Plaintiff's investment manager would not have attached significance to the omitted facts about Volkswagen's emissions fraud if those facts had been disclosed in the offering memorandum. As a result, Volkswagen has not rebutted *Affiliated Ute*'s presumption of reliance.

Volkswagen moved for summary judgment exclusively on the element of reliance. Because it has failed to rebut *Affiliated Ute*'s presumption of reliance, summary judgment is not warranted and the Court DENIES Volkswagen's motion.

IT IS SO ORDERED.

Dated: September 26, 2019

CHARLES R. BREYER
United States District Judge